IN THE SUPREME COURT OF THE UNITED STATES

Nos. 91-849 and 91-865

October Term, 1991

BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21, and ILLINOIS STATE BOARD OF EDUCATION,

Petitioners,

vs.

DOUGLAS C. CANNON and SHELDON and PAULINE BROZER, on behalf of ADAM BROZER,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals, Seventh Circuit

BRIEF OF RESPONDENTS SHELDON AND PAULINE BROZER IN OPPOSITION TO THE PETITIONS FOR WRIT OF CERTIORARI

MICHAEL D. GERSTEIN
520 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS 60611
(312) 222-0982

ATTORNEY OF RECORD FOR
SHELDON AND PAULINE BROZER
RESPONDENTS

JOSHUA SACHS
134 NORTH LA SALLE STREET
CHICAGO, ILLINOIS 60602
(312) 236-7442

OF COUNSEL

QUESTION PRESENTED

Whether the exercise of the Supreme Court's discretionary certiorari jurisdiction is warranted where the District Court and the Court of Appeals applied the standard set by this court in *Hendrick Hudson District Board of Education v. Rowely*, 458 U.S. 176 (1982) to affirm the modifications ordered by state educational administrative authorities, after two levels of evidentiary hearings, to an individualized educational program as initially proposed for a handicapped child by a local school district pursuant to the Education of the Handicapped Act, 20 U.S.C. §1400 et seq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The Education of the Handicapped Act

This case arises under the Education of the Handicapped Act, 20 U. S. C. §§1400 et seq. ("EHA").[1] The EHA provides federal funds to assist states in educating handicapped children. To receive these funds, a state must provide each handicapped child with a "free appropriate public education" tailored to the child's individual needs by an "individualized educational program" (IEP).

The development of an IEP requires the participation of a team including the parents, the child's teacher, designated specialists, and a representative of the local education agency, 20 U.S.C. §1401(19). Once promulgated, an IEP must

---

[1] Now renamed the Individuals with Disabilities Education Act, ("IDEA"), Pub.L No. 101-476, 104 Stat. 1141.

be reviewed annually and revised when necessary, 20 U.S.C. §§1414(a)(5), 1413(a)1), (11). If complaints arise, the state must convene an "impartial due process hearing," 20 U.S.C. §1415(b)(2).

Illinois has established procedures to comply with the EHA, Ill. Rev. Stat., Ch. 122, §14-8.02 (1989). Under Illinois law there are two levels of administrative review. The parents, guardian, or local school board dissatisfied with an IEP as originally promulgated may reqeust a Level I due process hearing through the State Board of Education by notice submitted to the State Superintendent of Education, *Ill. Rev. Stat.*, Ch. 122, §14-8.02(g). Any party aggrieved by the decision of the Level I hearing officer may appeal to the State Board of Eduation, which provides Level II review through impartial review

officers, *Ill. Rev. Stat.*, Ch. 122, §14-8.02(h).

The EHA provides that any party aggrieved by the outcome of administrative review may bring a civil action in state or federal court, 20 U.S.C. §1415(e)(2). In any such action, "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate," 20 U.S.C. §1415(e)(2). The court's focus is upon the educational program which finally emerges from the administrative review process, not the IEP as originally proposed, *Roland M. v. Concord School Committee,* 910 F.2d 983 (1st Cir., 1990), *Springdale School Dist. v. Grace,* 693 F.2d

41 (8th Cir., 1982), *cert. den.*, 461 U.S. 927 (1983).

Background and History of this Litigation

Adam Brozer is a fifteen-year old junior high school student who is handicapped primarily by a behavior disorder and also by a learning disability. His behavior disorder was identified in May, 1986, and his public school board, Petitioner District 21, recommended that he be placed in the Student Support Center of the Kilmer School, a public school. After initial reluctance, Adam's parents, Respondents Sheldon and Pauline Brozer, agreed to the SSC Kilmer placement.

Adam remained at SSC Kilmer from February of 1987 through the 1988-89 school year, but by the end of that time his behavior had become disruptive and

violent. The district, fearing that he would not be able to function the following year at Holmes Junior High School, recommended after a staff conference that he be placed at the Behavior Education Center at Jack London School. BEC London is a public school for children with serious behavior disorders.

In May of 1989 another staff conference was held to formulate the "individualized educational program" required by the EHA. The district recommended BEC London. The Brozers objected to the proposed placement, preferring placement at the Student Support Center at Holmes Junior High School. The district accepted the Brozers' preference, and Adam started junior high school in the fall of 1989 at SSC Holmes.

The SSC Holmes placement was not

successful. Adam quickly showed both behavioral and academic deterioration. The Brozers withdrew their consent for Adam to be disciplined in school or to receive social services. A third staff conference was held on November 11, 1989, the staff concluding that SSC Holmes was not serving Adam's educational needs. The district once again recommended placing Adam at BEC London. The parents once again refused to consent.

In response to the Brozers' refusal to consent to placement at BEC London, the district initiated the due process review procedure under 20 U.S.C. §1415(b)(1)(E).

At the Level I hearing, held in February, 1990, the parents argued that the BEC London placement was inappropriate because Adam's principal handicap was a learning disability, rather than a

behavior disorder. On this issue the Level I hearing officer agreed with the district, finding that Adam was primarily behavior disordered and only secondarily learning disabled.

The hearing officer did not, however, endorse the BEC London placement as sought by the district. Instead, she found that "irreconcilable differences" had developed between the Brozers and the district.[2]

Accordingly, the Level I hearing officer ordered that Adam be enrolled

---

[2] The Level 1 hearing officer listed actions taken by the Brozers which impeded the district's efforts to aid Adam's education, including: (1) the parents' refusal of support services for Adam, (2) the parents' refusal to supply Adam's medical history to his school, (3) the parents' refusal to allow detention or quiet lunches to be used as intervention strategies for Adam, (4) the fact that the parents had made derogatory comments about school staff members in Adam's presence, with the effect of undermining the school's educational programs. (ISBE App. 64-67

neither at BEC London, as the district had proposed, nor at SSC Holmes, as requested by the parents, but at Arden Shore Residential Educational Facility in Lake Bluff, Illinois. Arden Shore is a private residential school. Under the Level I order, Adam was to attend Arden Shore at public expense, and until Arden Shore had a vacancy for him he was to attend BEC London. The parents appealed the Level I decision and order, requesting at the Level II review hearing that Adam be placed either at SSC Holmes or at a private day placement closer to home than Ardem Shore. The School district did not appeal the Level I decision.

The Level II review officer[3] granted

---

[3] The Level II review officer, Douglas C. Cannon, is named as a respondent in the petition for writ of certiorari filed by petitioner ISBE No. 91-865.

the relief as requested by the parents.[4] He concurred in the district's judgment that Adam needed a placement more restrictive than that available at SSC Holmes. He rejected, however, both the district's proposed placement of BEC London and the Level I residential placement at Arden Shore. He held that the Level I hearing officer had failed to order the least restrictive placement that would still meet Adam's needs, 20 U.S.C. §1412(5), and found that placement in a residential school was not necessary. He ordered the district to place Adam at a private day school within thirty minutes commuting distance from his home or within ten miles from the edge of his home school

---

[4] However, the Level II review officer designated the School District the prevailing party for purposes of any petition for attorney fees. (ISBE App. 49)

district (ISBE App. 48).[5]

At the heart of the present litigation are the statements of the Level I and Level II hearing officers regarding their reasons for ordering private school placement for Adam. Both officers noted that "an extremely adversarial and distrustful relationship exists by the parents *and student* toward the School District." (ISBE App. 43, emphasis supplied) The Level II officer referred to incidents which he observed during the hearing as demonstrating "the subjective state of mind of the parents as to the adversarial or 'siege' mentality that now exists." (ISBE App. 44)

The Level II hearing officer was at pains to note that the parents' attitude

---

[5] The text of the Level II order is found at ISBE App. 48-49.

was in no way brought about "by any improper conduct of the School District," and that both hearing officers had found that "the District has displayed good faith in all its dealings in this matter." (ISBE App. 44) This hearing officer, while very critical of the parents' judgment in their dealings with the district, at the same time recognized that they, too, acted in subjective good faith and noted their powerful emotional commitment to the well-being of their son.[6]

---

[6] "This Hearing Officer can in no way condone the parents' conduct in this matter, which can be described at best as being obstructionist and undermining the efforts of the School District to assist their son. However, this Hearing Officer must note, as a parent, that where ones [sic] is concerned, it is very, very, difficult to respond intellectually rather than emotionally. Instinctively, when a child is threatened, as no doubt these parents see their child being 'threatened' by the School District, a parent rushes to the defense. Unfortunately, that point where emotion ebbs, and intellect once again

Both hearing officers specifically found that the "irreconcilable differences" (ISBE App. 66) and "adversarial and distrustful relationship" (ISBE App. 43) between the district and the parents was "a fact likely to effect the success or failure of the District's proposed placement at Jack London School." (ISBE App. 44)[7] Without reaching the academic question of whether the IEP as originally propounded by the district

---

reigns, seems unlikely to be reached in the foreseeable future in this matter." (ISBE App. 46-47)

[7] "[T]his Hearing Officer must note the state of mind of the parents is a fact likely to effect the success or failure of the District's proposed placement at Jack London School. While not stated in so many words, the Level I Hearing Officer's decision is also clearly based upon this attitude that has arisen with the parents and the student." (ISBE App. 44)

might have been otherwise appropriate,[8] both hearing officers rejected the district's IEP placement proposal in favor of some form of private school placement. The primary reason for such placement was to avoid the ongoing confrontations and disagreements between the parents and the district which had "doomed the [SSC

---

[8] Petitioner Illinois State Board of Education inaccurately and misleadingly frames the question presented for review, in part, as "whether the [ruling below] ... imposes an ... obligation on the States to defer to parental hostility to the Individualized Educational Program (IEP) developed for the child to receive educational benefits?" (Petition of ISBE, p. i., emphasis supplied) The ISBE's petition further attributes to the Court of Appeals a holding that this case involves parental hostility to "an otherwise appropriate IEP." (Petition of the ISBE, p. 12).

No court or administrative hearing officer has ever ruled, concluded, or suggested that the IEP proposed by the district was "otherwise appropriate" or "otherwise reasonably calculated to enable the child to receive educational benefits." In light of the findings of fact and dispositions ordered at hearings, the question was purely theoretical and was never addressed in any of the decisions below.

Holmes] placement to failure" and which gave the Level II hearing officer no reason to expect that the [BEC London] placement will be successful without parental cooperation." (ISBE App. 47)

The Federal Litigation

The parents accepted the decision of the Level II hearing officer. The district, although designated by the hearing officer as "the prevailing party" (ISBE App. 49), did not. Instead, the district filed suit pursuant to 20 U.S.C. §1415(e)(2) in the United States District Court for the Northern District of Illinois seeking reversal of that portion of the Level II administrative order which directed it to place Adam in a private day school at public expense.

Neither party sought to introduce additional evidence at the District Court

level, as either had a right to do under 20 U.S.C. §1415(e)(2), and the District Court made its ruling, without objection, on the basis of the administrative records and the briefs submitted by counsel.

After dealing with preliminary procedural questions, the District Court stated:

> The real issue remaining to be determined is whether the Level II officer could rely on the well-established facts concerning the parents' and Adam's negative attitudes towards the District's good-faith attempts at providing a free appropriate education to Adam in ordering a private, as opposed to public, day-school placement to be a part of the free appropriate education to which Adam is entitled under the EHCA. (ISBE App. 3)

It found that:

> [B]oth the Level I and the Level II hearing officers believed that Adam would not be able to satisfactorily obtain the required educational benefits from the District's proposed placement in light of the history of Adam's and his parents' relationship with the District.

(ISBE App. 36)

It was the District Court's conclusion that:

> giving due weight to the prior administrative proceedings in this case, the court finds a preponderance of the evidence supports the Level II hearing officer's conclusion that placement in a private day-school facility is necessary at this time in order for Adam to obtain the educational benefit mandated by the EHCA. Thus, the court agrees with the Level II order and finds it appropriate in all respects...

The District Court found in favor of the parents, affirming the Level II administrative order and directing that it be implemented. (ISBE App. 39)

The school district appealed to the Court of Appeals for the Seventh Circuit, which, with one judge dissenting, affirmed the ruling of the District Court concluding "the District Court rightly held that the BEC/Jack London placement did not meet the substantive standard set

by the EHA and that the IEP ordered by the Level II hearing officer is the least restrictive placement that will be of educational benefit to Adam." (ISBE App. 11-12)[9]

---

[9] In the words of the Court of Appeals,

"The district court applied the correct legal standard in affirming the decision of the Level II hearing officer ordering Adam to be placed in a private day school rather than at BEC/Jack London. A school district has met the substantive requirements of the EHA if its proposed placement is reasonably calculated to be of educational benefit to the handicapped child. The district judge properly kept this question foremost in his mind, as had the hearing officers before him. He ultimately concurred in the opinions of the Level I and Level II hearing officers that Adam *'would not be able to satisfactorily obtain the required education benefits from the district's proposed placement* in light of the history of Adam's and his parents' relationship with the District.'" (ISBE App. 7, emphasis in the original)

ARGUMENT

THIS CASE IS NOT APPROPRIATE FOR EXERCISE OF THE SUPREME COURT'S DISCRETIONARY CERTIORARI JURISDICTION. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS FOLLOWED SETTLED LAW AND CORRECTLY APPLIED THE CONTROLLING DECISION OF THIS COURT TO AFFIRM THE RULINGS OF STATE ADMINISTRATIVE HEARING OFFICERS IN A CASE GOVERNED BY ITS OWN FACTS AND WITHOUT PRECEDENTIAL VALUE.

Summary

This case calls no novel or significant legal issue to the attention of the Supreme Court. It presented the state educational administrators with an unusual, highly individual, problem. The state administrators, through two levels of hearings and review, devised a reasonable and appropriate solution. (ISBE App. 40-51, 52-72) The District Court reviewed the administrative records and concluded that it should defer to the expert administrative judgment. (ISBE App. 19-39) The Court of Appeals affirmed

the District Court. (ISBE App. 1-15)

Petitioners misleadingly describe this case, which called for the exercise of sound administrative judgment and practical sense, as a fundamentally legal controversy. They have argued in their petitions for certiorari that there is a conflict between the Court of Appeals for the Seventh Circuit and other Courts of Appeals, and even that there is a conflict within the Seventh Circuit itself.[10] Neither conflict exists. Petitioners further urge that the Seventh Circuit's ruling is in conflict with this Court's controlling decision in *Hendrick Hudson Dist. Board of Education v. Rowley*, 458 U.S. 176 (1982). Again, no such conflict

---

[10] No conflict within the Seventh Circuit was apparent to the Court of Appeals, which unanimously denied petitioner District 21's petition for rehearing and its suggestion for rehearing en banc. (ISBE App. 17)

exists. The Court of Appeals, like the District Court, relied upon and followed the *Rowley* decision.

The petitions for writ of certiorari should be denied because the courts and administrative authorities below did no more than apply settled principles of law to a specific factual situation calling for the exercise of professional educational knowledge, experience and judgment, and because they did so correctly.

The Petitions Mischaracterize the Ruling Below

The District Court observed on two separate occasions that Petitioner District 21 had mischaracterized the record.[11] The petitions for writ of

---

[11] "As to the District's arguments concerning the lack of evidence of irreconcilable differences between the parents and the District and the Level II Officer's reliance on parental

certiorari similarly mischaracterize both the question presented to, and the decision made by, the Court of Appeals.

Petitioner District 21 inaccurately attributes to the Court of Appeals a determination "that the parents' egregious, disruptive and hostile course of conduct precluded the School District from implementing an IEP which was otherwise reasonably calculated to confer

---

preference, the court finds the District has mischaracterized the record." (ISBE App. 31)

"The District ... argues that the Level II Officer's findings and conclusions ... were improperly based upon the letter of Dr. Atlas ... Although the Level II officer discussed Dr. Atlas' opinions ... [he] specifically stated that he had reached similar conclusions before he reviewed Dr. Atlas' letter. The District's attorney conveniently fails to mention this and characterizes the record in her brief to this court in a way which implies that the Level II officer relied only on Dr. Atlas' letter for his findings concerning [a specific issue] ... and that this letter formed the basis of the Level II order for private placement. This simply was not the case." (ISBE App.32)

educational benefits." (District's Petition, 6-7, *cf.* ISBE's Petition, 12) As noted above (footnote 8, supra.,) neither the Court of Appeals nor any other court or administrative officer ever found that IEP as originally proposed by the District was reasonable, "otherwise" or not. The findings below, at every stage of administrative and judicial review, were that the placement proposed by the District could not succeed. The distrust felt by the parents and by the student towards the District was a reef upon which any public school placement was considered sure to founder. In light of this virtual certainty it was neither necessary nor appropriate to consider whether the district's original IEP proposal might be

"otherwise" reasonable or appropriate.[12]

Petitioner ISBE likewise inaccurately represents the decision of the Court of Appeals. At page 13 of its petition for writ of certiorari, ISBE recites:

> "In applying [the *Rowley*] test, the proper focus is on the program proposed by the school district and not the program sought by the parents. [citations omitted]
>
> "The Seventh Circuit's opinion does not apply the *Rowley* test to the school district's proposed IEP. The Seventh Circuit, rather, defined the issue as whether the Level II Hearing Officer's order of a private day placement was reasonably calculated to be of educational benefit to Adam."

But the ISBE neglects to include the complete statement of the issue as defined

---

[12] The statement in the District's petition to the effect that "[T]he majority [of the Court of Appeals] determined that the *parents' egregious, disruptive and hostile course of conduct* precluded the School District from implementing an IEP," (Dist. Pet., 6-7, emphasis added) is further misleading in implying that the emphasized words are those of the Court of Appeals. They are those of the petitioner.

by the Court of Appeals:

> "The question is simply whether the BEC/Jack London placement recommended by Adam's school district was inappropriate for Adam and whether the private day placement ordered by the Level II hearing officer is indeed reasonably calculated to be of educational benefit to Adam." (ISBE App. 6)

Petitioners Misunderstand Judicial Review of an IEP

More serious than Petitioners' misphrasings of the questions presented to and decided by the Court of Appeals is their fundamental misconception of what was actually before those courts for review. Petitioners, failing to distinguish between administrative and judicial review, have not recognized that the District Court and the Court of Appeals have upheld, not rejected, the IEP.

Petitioners contend that this case is so significant as to warrant the exercise

of the Supreme Court's certiorari review because the Court of Appeals for the Seventh Circuit changed the focus of judicial review of administrative IEP decisions under the EHA, in violation of the standard propounded by this Court in *Rowley*, in contravention of the holdings of other Courts of Appeals,[13] and even in contravention of its own previous decision in *Lachman v. Board of Education*, 852 F.2d 290 7th Cir., 1988).

Petitioners are mistaken. The District Court and the Court of Appeals reached a result advserse to the local school district, not because they misapplied or alterred the standard of review, but

---

[13] *Cf. eg., Roland M. v. Concord School Committee*, 920 F.2d 983 (1st Cir., 1990), *G.D. v. Westmoreland School District*, 930 F.2d 942 (1st Cir., 1991), *Doe v. Defendant 1*, 898 F.2d 1186 (6th Cir., 1990), *Cain v. Yukon Public Schools, Dist. 1-27*, 775 F.2d 15 (10th Cir., 1985)

because the local district's proposal itself had been modified on review by the state's educational administrators. Petitioners assert that the courts below failed to focus on the appropriateness of the IEP. But focus on the IEP is precisely what the courts did. When a court reviews an IEP, "the court's focus is upon the educational program which finally emerges from the review process, not the IEP as originally proposed," *Roland M. v. Concord School Committee*, 910 F.2d 983, 988 (1st Cir., 1990), and see *Springdale School District v. Grace,* 693 F.2d 41 (8th Cir., 1982).

Although both petitioners cite and rely upon *Roland M.*, both are oblivious to its holding, and both argue as though a court reviewing an IEP is obligated to ignore the results of the state administrative

review process and reinstate the IEP originally proposed by the local school district unless it is plainly inappropriate. If Petitioners are correct, then the extensive provisions of the EHA for participation by parents and guardians, for due process hearing and review by the professional educational authorities of the state, and for judicial review and appeal, are rendered meaningless and the local district enjoys virtually dictatorial power to enforce its IEP as originally conceived.

It is plainly unrealistic to believe that this was the intent of Congress, and it would be an unwise allocation of the Supreme Court's time to grant certiorari for the sole purpose of rejecting a misconceived argument which no court has ever endorsed.

An examination of the authorities cited by Petitioners reveals that in every one of them, including the Seventh Circuit's own *Lachman* decision, the Court of Appeals was asked to review a case in which the state educational authorities had reviewed and affirmed the IEP as proposed by the local district. In the present case, on the contrary, the hearing and review officers rejected or significantly modified the IEP. It is for this reason alone, not because of any change in legal focus or misunderstanding of the *Rowley* rule, that when the District Court and the Court of Appeals upheld the Level II review officer's order they affirmed an IEP different from that which District 21 had originally submitted. Contrary to petitioners' contention, the decision of the Seventh Circuit in this case accords

perfectly with *Roland M. v. Concord, G.D. v. Westmoreland, Doe v. Defendant I, Cain v. Yukon,* and with *Lachman v. Board.*

The Petitioners fail to understand this, and devote their arguments to asserting the obviously inaccurate proposition that the Court of Appeals has given stubborn parents a veto power over educational authorities. A review of the opinion of the Court of Appeals immediately demonstrates that the alarmed Petitioners have read into that decision a meaning that is simply not there. In fact, the Seventh Circuit was careful to limit its ruling to the facts of the case before it. The opinion below unequivocally reaffirms the statement in *Lachman* that parents:

> do not have a right under the [EHA] to compel a school district to provide a specific program or employ a specific methodology in providing

> for the education of their handicapped child. (ISBE App. 8)

Lachman, 852 F.2d at 297, citing *Rowley,* 458 U.S. at 207. Furthermore, the Court of Appeals hedged its opinion against overly broad interpretation, clearly recognizing that the state hearing officers had been faced with a situation in which the IEP as initially proposed by the district could not succeed because of parental hostility which may not have been objectively warranted.

> *Lachman* aside, the district's larger point is well taken. Allowing a consideration of parental hostility to a state-proposed IEP to the extent that it limits the IEP's benefit to the child will result at times in rejection of the school district's proposal simply because the parents, perhaps irrationally, oppose it. The plaintiff school district here exhorts us not to adopt a position that will "reward" parents for aberrant or distasteful behavior. Under the EHA, however, our concern is not rewarding or punishing parents. The appropriate concern is finding a program which

> will be of educational benefit to the child. Were we to adopt the school district's position and hold that parental attitudes can never be considered even if they have impaired the workability of the IEP for the child, this would in effect be punishing children for the actions of their parents. A child whose parents oppose an IEP so vehemently as to "doom" its prospects should not be enrolled in the placement merely to enable educational agencies and federal courts to "discipline" parents. The EHA makes clear whose interest must be paramount. (ISBE App. 9-10)

The Court of Appeals was correct in ruling that "[t]he District Court rightly held that the BEC/Jack London placement did not meet the substantive standard set by the EHA and that IEP ordered by the Level II hearing officer is the least restrictive placement that will be of educational benefit to Adam." (ISBE App.11-12)

This case is not appropriate for review by the United States Supreme Court. The

petitions for writ of certiorari should be denied.

CONCLUSION

This case was correctly resolved through the state administrative hearing process. The District Court correctly upheld the Level II hearing officer. The Court of Appeals followed the EHA and the controlling decision of the Supreme Court in affirming the District Court. There is no conflict between the decision below and the Seventh Circuit's previous decision in *Lachman v. Board of Education,* and the decision below is fully in accord with the decisions of other Courts of Appeals.

The petitions for writs of certiorari should be denied. This case should be remanded to the Court of Appeals for the sole purpose of entertaining respondents' petition for attorney fees pursuant to 20

U.S.C. §1415(e)(4)(B).

Respectfully submitted,

MICHAEL D. GERSTEIN
520 North Michigan Avenue
Suite 824
Chicago, Illinois 60611
(312) 222-0982

Attorney for Respondents-Brozer

Of Counsel:

JOSHUA SACHS
134 North La Salle Street
Suite 2222
Chicago, Illinois 60602
(312) 236-7442